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No. 97-2045

In The

Supreme Court of the United States

October Term, 1997

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*,

Petitioners,

vs.

STATE OF ALABAMA AND
STATE DEPARTMENT OF REVENUE,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

MOTION OF *AMICI CURIAE* ALLIEDSIGNAL INC., AVON PRODUCTS, INC., BURGER KING CORPORATION, CYTEC INDUSTRIES, INC., DARDEN RESTAURANTS, ELI LILLY AND COMPANY, GEORGIA-PACIFIC CORPORATION, MATSUSHITA ELECTRIC CORPORATION OF AMERICA, MORTON INTERNATIONAL, INC., NABISCO, INC., PICCADILLY CAFETERIAS, INC., R.J. REYNOLDS TOBACCO COMPANY, THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, AND TRICON GLOBAL RESTAURANTS, INC. IN SUPPORT OF PETITION AND BRIEF *AMICI CURIAE*

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AlliedSignal Inc., Avon Products, Inc., Burger King Corporation, Cytec Industries Inc., Darden Restaurants, Eli Lilly and Company, Georgia-Pacific Corporation, Matsushita Electric Corporation of America, Morton International, Inc., Nabisco, Inc., Piccadilly Cafeterias, Inc., R.J. Reynolds Tobacco Company, The Prudential Insurance Company of America, and Tricon Global Restaurants, Inc. ("*amici*") hereby move, pursuant to S. Ct. R. 37.2, for leave to file a brief *amicus curiae* in support of the petition for a writ of *certiorari* to the Supreme Court of Alabama. *Amici* are filing this motion because Respondents have declined to consent to this *amicus curiae* brief.[1] A copy of the proposed brief is attached.

As more fully explained at pages 1-2 of the attached brief under "Interest of *Amici Curiae*," *amici* are corporations incorporated in States other than Alabama and conduct business in interstate commerce, including in Alabama. All suffer the effects of Alabama's discriminatory franchise tax since they are forced to bear a heavier franchise tax burden than competing corporations that are incorporated in Alabama.

The brief will assist the Court in determining whether to grant *certiorari* because *amici* are uniquely positioned to point out: (1) the importance of this case to all foreign corporations doing business in Alabama in view of Alabama's continuing enforcement of its discriminatory taxing scheme; (2) the need to for this Court to grant *certiorari* in this case in view of Alabama's inability to comply voluntarily with clear precedent of this Court; and (3) the challenge to the integrity of this Court's decisions in view of (i) Alabama's continuing reliance on its earlier decision in *White v. Reynolds Metal Co.*, 558 So. 2d 373 (Ala. 1989), *cert. denied*, 496 U.S. 912 (1990) ("*Reynolds*"), despite subsequent decisions

1. In response to a request for consent of Respondents to the filing of an *amicus curiae* brief, Respondents' counsel replied by letter of July 14, 1998, that "the Alabama Revenue Department respectfully declines to consent to your filing an Amicus Brief on behalf of your clients who are not parties to this litigation."

of this Court that have repudiated *Reynolds*; and (ii) Alabama's use of *res judicata* to block attempts by taxpayers who were strangers to *Reynolds* from obtaining judicial review of Alabama's unconstitutional tax, a denial of due process that also conflicts directly with a decision of this Court. Given Respondents' position on the *res judicata* issue (*i.e.*, that non-parties are bound by *Reynolds*), it is particularly ironic that Respondents would not consent to this brief on the grounds that *amici* were "not parties to this litigation."

Accordingly, *Amici* respectfully request that the Court grant leave to file the attached brief *amici curiae.*

Respectfully submitted,

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CONSENT OF THE PARTIES

Petitioners have consented to the filing of this *amicus curiae* brief, but Respondents have declined to consent. *Amici*, therefore, have filed a motion for leave to file this brief in accordance with S. Ct. R. 37.2(b).[1]

INTEREST OF *AMICI CURIAE*

Pursuant to S. Ct. R. 37, AlliedSignal Inc., Avon Products, Inc., Burger King Corporation, Cytec Industries Inc., Darden Restaurants, Eli Lilly and Company, Georgia-Pacific Corporation, Matsushita Electric Corporation of America, Morton International, Inc., Nabisco, Inc., Piccadilly Cafeterias, Inc., R.J. Reynolds Tobacco Company, The Prudential Insurance Company of America, and Tricon Global Restaurants, Inc. ("*amici*") respectfully submit this brief as *amici curiae* in support of the petition for a writ of *certiorari* filed by Petitioners in the above-captioned case.

Amici, corporations organized under laws of States other than Alabama (referred to herein as "foreign corporations"), are engaged in interstate commerce, including doing business in Alabama. Consequently, *amici* are subject to the discriminatory Alabama franchise tax on foreign corporations. Ala. Code § 40-14-41 (1993). This case is important to *amici* because Alabama continues to collect this tax from *amici* in reliance on *White v. Reynolds Metals Co.*, 558 So. 2d 373 (Ala. 1989), *cert. denied*, 496 U.S. 912 (1990) ("*Reynolds*"). This places *amici* at a competitive disadvantage to corporations engaged in business in Alabama that are organized under the laws of Alabama (referred to herein as "domestic corporations").

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1. The letters from counsel for Petitioners and Respondents have been filed with the Clerk of the Court. Pursuant to S. Ct. R. 37.6, *amici* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

Furthermore, in view of Alabama's continuing exploitation of *Reynolds* in collecting the tax, asserting *res judicata* in this case, and contending that any relief should be prospective only if the tax is ever declared unconstitutional, it is particularly important to *amici* that this Court grant *certiorari* in this case. Otherwise, it is apparent that Alabama will continue to levy and collect its clearly unconstitutional tax for as long as possible, and it is doubtful whether Alabama will ever comply voluntarily with the Commerce Clause[2] precedents of this Court. In the meantime, *amici* are at risk that future litigation efforts in Alabama will be similarly frustrated by the contentions Alabama has made in this case. *Amici*, like other foreign corporations in Alabama, intend to pursue claims for refunds of franchise tax for past years.

SUMMARY OF ARGUMENT

Alabama's continuing reliance on *Reynolds* to justify its discriminatory taxing scheme (despite subsequent decisions of this Court) and Alabama's resort to *res judicata* to avoid judicial review (also in conflict with a decision of this Court) are an affront to this Court's Commerce Clause jurisprudence. This Court should grant *certiorari* to protect the integrity of its decisions.

Alabama's "extreme application" of *res judicata* directly conflicts with *Richards v. Jefferson County*, 517 U.S. 793 (1996) by depriving Petitioners, who were strangers to *Reynolds*, of due process. In addition, Petitioners are deprived of the ability to rely on both subsequent Commerce Clause decisions of this Court and further factual development, a harsher result than applies to the parties themselves in an earlier tax case. This further compounds the unconstitutionality of the result below.

2. U.S. Const. art. I, § 8, cl. 3.

The unconstitutionality of Alabama's discriminatory taxation of foreign corporations has been confirmed by subsequent decisions of this Court, which have repudiated the constitutional analysis in *Reynolds*. Consequently, it is important for this Court to grant *certiorari* in order to bring Alabama's reliance on *Reynolds* to an end.

Finally, in view of still more precedent of this Court confirming a State's obligation to provide meaningful backward-looking relief, this Court also should reject Alabama's arguments for prospective relief only. Alabama must not be permitted to ignore this Court's precedent and then retain its unconstitutional tax collections.

ARGUMENT

THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE THE RULING OF THE ALABAMA SUPREME COURT IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT, AND, UNDER THE CIRCUMSTANCES HERE, *CERTIORARI* IS PARTICULARLY WARRANTED IN ORDER TO PROTECT THE INTEGRITY OF THIS COURT'S DECISIONS.

It is important for this Court to grant *certiorari* in this case because of Alabama's continuing reliance on and continuing exploitation of *Reynolds* — a 1989 decision that is unquestionably in direct conflict with this Court's subsequent decisions in *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996) ("*Fulton*"); *Oregon Waste Sys. v. Department of Envtl. Quality*, 511 U.S. 93 (1994) ("*Oregon Waste*"); and *Associated Indus. v. Lohman*, 511 U.S. 641 (1994) ("*Associated Industries*").[3]

3. This case involves a direct "conflict between a decision of the highest state court and that of the Supreme Court on a matter of federal law [which] is a strong reason for the granting of certiorari." R. Stern, et al., *Supreme*

(Cont'd)

Every position Alabama takes with respect to every issue (including *res judicata*, the constitutionality of its discriminatory franchise tax on foreign corporations, and the relief to be accorded taxpayers if the tax ultimately is held to be unconstitutional) is grounded on the State's continued reliance on *Reynolds*. Furthermore, Alabama's arguments in this case confirm that all future litigation in Alabama involving these issues also will be infected by the State's claim that, until *Reynolds* is directly overruled, the State is entitled to continue to rely on *Reynolds* in collecting and then retaining the franchise taxes paid by foreign corporations. As noted by Justice Maddox in his concurring opinion, the only opinion issued by a member of the majority in the Alabama Supreme Court:

> [A]lthough I realize that the [United States] Supreme Court has released some opinions that could be interpreted as indicating a change in that Court's view of the constitutionality of state taxes such as that at issue in this case, the fact remains that the Supreme Court refused to review this Court's decision in *Reynolds Metals*, and that, as of today, *Reynolds Metals* remains the law.

South Central Bell Co. v. Dept. of Revenue, Pet. App. 7a.[4]

(Cont'd)
Court Practice 208 (7th ed. 1993); *see also* S. Ct. R. 10. The Alabama Supreme Court's disregard of clear precedent of this Court bears striking resemblance to the Ohio Supreme Court's actions in *Limbach v. Hooven & Allison Co.*, 466 U.S. 353 (1984), where this Court granted *certiorari* because "a state court has disregarded a federal constitutional ruling of this Court." *Id.* at 362; *see also Hudson v. Louisiana*, 450 U.S. 40, 42 (1981); *William E. Arnold Co. v. Carpenters Dist. Council*, 417 U.S. 12, 14 (1974); *Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 371-72 (1974).

4. "Pet." references are to the petition for a writ of *certiorari* filed in this case. "Pet. App." references are to the appendices to the petition.

It is intolerable for a State to continue in this fashion to ignore and avoid the clear, unequivocal constitutional directives of this Court. Such intransigence itself raises a serious Commerce Clause concern. A State must not think that, because of an earlier decision in that State, it may ignore with impunity subsequent decisions of this Court and collect plainly unconstitutional taxes. That is exactly what Alabama is doing.

Apparently, Alabama thinks that *Fulton*, *Oregon Waste*, and *Associated Industries* apply everywhere in the United States except in Alabama and that it is permanently shielded from further Commerce Clause precedent of this Court because of the 1989 decision in *Reynolds*. Such a notion is a direct affront to the Commerce Clause because it would result in varying levels of constitutional protection depending upon the State in which business is conducted.[5]

Under these circumstances, it is important for this Court to grant *certiorari* in order to protect the integrity of its decisions. Alabama must be told that it must conform its taxing practices to the requirements of the Commerce Clause as clearly stated

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5. This Court has repeatedly recognized the necessity of treating the Nation as one economic unit.

> [I]n order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

Oregon Waste at 98 (citing *Hughes v. Oklahoma*, 441 U.S. 322 (1979)); *see generally* The Federalist No. 42 (James Madison). "[O]ur economic unit is the Nation, which alone has the gamut of powers necessary to control the economy, . . . [and] has as its corollary that the states are not separable economic units." *Oregon Waste* at 98-99 (citing *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949)).

by this Court. Otherwise, Alabama will be rewarded for its intransigence, and other States will be encouraged to hold out for as long as possible in similar circumstances in the hope of retaining their unconstitutional gains.

In this case, the decision of the Alabama Supreme Court is particularly egregious in view of the multiplicity of decisions of this Court with which it is in direct conflict.

1. The fact that Alabama's "extreme application" of *res judicata* prevents taxpayers who were strangers to the *Reynolds* case from relying on subsequent Commerce Clause decisions of this Court compounds the unconstitutionality of the result below.

Alabama's application of *res judicata,* in effect, creates a new, unprecedented class action — a class of all foreign corporations doing business in Alabama — without any of the usual class action protections. *See* Fed. R. Civ. P. 23. Petitioners have demonstrated that the *res judicata* issue warrants this Court's review in light of the direct conflict with this Court's decision in *Richards v. Jefferson County*, 517 U.S. 793 (1996), another case from Alabama. *See* Pet. 19-24. As in *Richards*, the "extreme application" of *res judicata* to Petitioners in this case "deprived them of the due process of law guaranteed by the Fourteenth Amendment." *Id.* at 797.

Amici wish to point out that the "extreme application" of *res judicata* in this case also has the effect of preventing taxpayers, who were strangers to the *Reynolds* case, from being able to rely on subsequent Commerce Clause precedent of this Court, including cases that are directly contrary to *Reynolds*. It is hard to imagine a more "extreme application" of *res judicata* given the general recognition that the parties themselves in an earlier tax case are not prevented from relying on such

subsequent decisions of this Court when later tax years are litigated. *See Limbach v. Hooven & Allison Co.*, 466 U.S. 353 (1984) ("*Hooven II*"); *Commissioner v. Sunnen*, 333 U.S. 591 (1948); *see also State v. Plantation Pipeline Co.*, 265 Ala. 69, *cert. denied*, 352 U.S. 943 (1956).

In *Sunnen*, this Court rejected the attempt by the Commissioner of the Internal Revenue Service to invoke collateral estoppel in a later tax year, noting that collateral estoppel —

> is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to created vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers.

Sunnen, 333 U.S. at 599 (emphasis added).[6] It is interesting to note that there was no suggestion that the more preclusive doctrine of *res judicata* was potentially applicable.

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6. In the present case, intervening developments of both the law and significant facts have occurred. As discussed below in part 2, the legal basis upon which *Reynolds* was decided was unequivocally rejected by this Court in *Fulton*, *Oregon Waste*, and *Associated Industries*. Further, the Alabama Supreme Court based the decision in *Reynolds* in part upon an asserted lack of proof that the franchise tax in fact discriminates against foreign corporations. *Reynolds*, 558 So. 2d at 370. The trial court in this case found no such evidentiary gaps.

> The Court finds that the Taxpayer's evidence in this action clearly and abundantly demonstrates that the franchise tax on foreign corporations discriminates against them for no other reason than the state of their incorporation.

Pet. App. 21a-22a (footnote omitted). Therefore, intervening developments in both the law and the facts have occurred, a circumstance that would render collateral estoppel inapplicable if the parties were the same.

The result in *Hooven II* is particularly illuminating. In *Hooven II*, the taxpayer argued that the Ohio Tax Commissioner was barred by collateral estoppel because of the prior holding in *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945) ("*Hooven I*"), which held that the "original package" doctrine of the Import-Export Clause of the United States Constitution prevented the State from taxing certain imported goods. However, the original package doctrine was subsequently invalidated in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), although the Court never specifically overruled *Hooven I*. The Ohio Supreme Court agreed with the taxpayer's argument that, notwithstanding the intervening decision of this Court, the Commissioner was collaterally estopped from re-litigating the validity of the original package doctrine in *Hooven II* because *Hooven I* dealt with the same issues and the same taxpayer. In reversing, this Court held that

> [t]he years involved in this tax case, however, are not the same tax years at issue in *Hooven I*. Because of this, *Commissioner v. Sunnen, supra,* is pertinent and, indeed, is controlling . . .

Hooven II, 466 U.S. at 362. This Court held that collateral estoppel could not repudiate this Court's intervening pronouncement, noting that the reason for limiting the scope of collateral estoppel is especially strong when important constitutional issues are involved and the "constitutional analysis of the earlier case is repudiated by this Court's intervening pronouncement." *Id.*

In this case, Alabama argued for *res judicata* so that it could avoid both the unmistakable impact of this Court's decisions in *Fulton, Oregon Waste,* and *Associated Industries* (which have repudiated the constitutional analysis of *Reynolds*) and Petitioners' further factual development. Thus, in addition to being in direct conflict with *Richards*, the "extreme application" of *res judicata* also is contrary to *Sunnen* and plainly a denial of due process. How can a stranger to an earlier decision be more bound by that decision in dealing with different taxable years than the parties to that decision would be? This Court should not permit its decisions to be avoided in this way.

2. Alabama inappropriately relies on *Reynolds* to avoid compliance with this Court's subsequent decisions in *Fulton, Oregon Waste,* and *Associated Industries.*

Alabama's principal defense of its facially discriminatory treatment of foreign corporations against Commerce Clause challenge is its reliance on the compensatory or complementary tax doctrine as applied in *Reynolds*. In setting forth its complementary tax argument in its brief in this case to the Alabama Supreme Court, the State made no fewer than 18 references to *Reynolds*. State Department of Revenue's Brief to Ala. Sup. Ct. ("DOR Brief"), pp. 23-34 (May 25, 1997).

But, the subsequent opinions of this Court in *Fulton, Oregon Waste,* and *Associated Industries*, which more fully delineated the three requirements for application of the compensatory or complementary tax doctrine, directly repudiate the Alabama Supreme Court's analysis in *Reynolds*. For example, in *Reynolds,* the Alabama Supreme Court stated:

> The question, as we see it, is whether the franchise tax on foreign corporations *invidiously* discriminates against them by imposing a grossly disproportionate tax on them for no other reason than to provide a competitive advantage to domestic corporations. We emphasize the term "invidiously" because the tax will be sustained if its classifications are rationally related to a legitimate state purpose and because, in

> enacting taxing statutes, legislatures are not required to reach equality with mathematical precision.

558 So. 2d at 382. But, in *Associated Industries*, this Court rejected as irrelevant the State's motive in enacting a tax, stating:

> A court need not inquire into the purpose or motivation behind a . . . law in order to determine that, in actuality, the law impermissibly discriminates against interstate commerce.

511 U.S. at 641. This Court also confirmed, in *Associated Industries*, that there is a "strict rule of equality" in applying the complementary tax doctrine. The State must show that its tax on interstate commerce does not exceed its tax on intrastate commerce. 511 U.S. at 646.

The Alabama Supreme Court in *Reynolds* also failed to analyze, as required by this Court's decisions, whether the taxes in issue (the domestic franchise tax and the domestic shares tax paid by domestic corporations and the foreign franchise tax paid by foreign corporations) were imposed on "substantially equivalent events" so that they served "as mutually exclusive 'prox[ies]' for each other." *Oregon Waste*, 511 U.S. at 103; *Fulton*, 516 U.S. at 340 n.6. The franchise tax on domestic corporations is imposed on their capital stock regardless where they engage in business, whereas the franchise tax on foreign corporations is imposed on the amount of their capital employed in Alabama.[7] A domestic corporation's issuance of capital stock and the employment of capital in a State are not substantially equivalent events. If Alabama wants to tax corporations on the amount of their capital employed in Alabama, it can and should impose such a tax on a nondiscriminatory basis on both domestic

7. Ala. Code § 40-14-40 and Ala. Code § 40-14-41 are set forth at Pet. App. 90a-97a.

and foreign corporations. Until it does so, a separate decision to tax domestic corporations on their capital stock cannot serve as a basis for taxing only foreign corporations on their capital employed in Alabama.[8]

Rather than address the three requirements for application of the complementary tax doctrine, as applied by this Court's post-*Reynolds* decisions, Alabama essentially argues that these decisions "do not constitute a significant (if any) departure from the standards in effect at the time" *Reynolds* was decided. DOR Brief, p. 32. That argument would merely confirm that *Reynolds* was wrong when it was decided. But the point here is that, in all events, taxpayers are entitled to have *Reynolds* reconsidered in light of this Court's subsequent decisions. That is what Alabama seeks to avoid — for as long as possible.

8. This Court has made it clear that —

> the concept of the compensatory tax . . . is merely a specific way of justifying a facially discriminatory tax as achieving a legitimate local purpose that cannot be achieved through nondiscriminatory means.

Oregon Waste at 102 (emphasis added). There is no justification for using different tax bases for taxing foreign and domestic corporations in this case since a nondiscriminatory method is plainly available. *Amici* understand that the Alabama Constitution prevents the State from imposing an apportioned tax on the domestic corporations based on their capital employed in the state. Ala. Const. of 1901 art. XII, § 229. But this constraint in the Alabama Constitution can hardly justify a taxing scheme that violates the Commerce Clause of the United States Constitution.

3. Alabama also relies inappropriately on *Reynolds* in claiming that, even if its franchise tax on foreign corporations is unconstitutional, any relief should be prospective for all taxpayers and that none of its unconstitutional tax collections need be refunded.

Alabama's arguments to the Alabama Supreme Court for prospectivity are more of the same — reliance on *Reynolds* and a complete disregard of this Court's precedents. Alabama ignores this Court's clear precedent regarding a State's obligation to provide "meaningful backward-looking relief." *See Newsweek v. Florida Dep't of Revenue*, 118 S. Ct. 804 (1998); *Reich v. Collins*, 513 U.S. 106 (1994); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993); *James Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991); *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990).

Despite all of this precedent of this Court, the State argued below to the Alabama Supreme Court that:

> [T]he Alabama Court of Civil Appeals in *White v. Reynolds Metals Company*, 558 So. 2d 367 (Ala. Civ. App. 1989), ruled that its decision that the Alabama franchise tax scheme unconstitutionally discriminates against foreign corporations would be given prospective application. The ruling regarding the prospective application . . . has never been reversed. Consequently, should this Court decide on the merits of the case adversely to the Department, it should give deference to the Court of Civil Appeals' ruling under the doctrine of *stare decisis* in deciding whether to grant prospective application.

DOR Brief, p. 45.

Apparently, Alabama recognizes the doctrine of *stare decisis*; it is just confused as to which court's precedent it should follow.[9] The important point here is that such arguments further confirm the need for this Court to grant *certiorari*. Otherwise, it is apparent that Alabama will continue disregarding this Court's precedent.

CONCLUSION

This Court's denial of *certiorari* in *Reynolds* has emboldened Alabama to disregard decisions of this Court in an effort to collect its unconstitutional tax for as long as possible. Such a strategy is a serious challenge to this Court's Commerce Clause jurisprudence. Accordingly, *amici* urge this Court to grant *certiorari* in this case in order to protect the integrity of this Court's decisions and make it plain that such a strategy must ultimately be unavailing. In addition, given the clear precedent of this Court, *amici* also suggest that it would be appropriate for this Court to summarily reverse without plenary review.

Respectfully submitted,

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9. Not only is Alabama arguing for denial of taxpayers' right to substantial backward-looking relief, Alabama also has foiled taxpayers' attempts to avail themselves of a predeprivation remedy by withholding payment of franchise tax and placing bonds in escrow with the Alabama courts. *See Monroe v. Gladwin Corp.*, Ala. S. Ct. No. 1961871, Petition For Extraordinary Writ (Jan. 30, 1998), *reprinted in State Tax Notes*, 97 STN 174-1 (Sept. 9, 1997).